

Admin.

October 22, 2009

Second Supplement to Memorandum 2009-38

**New Topics and Priorities:
Further Comments of Sam Shabot**

Attached is a new communication from Sam Shabot, who reiterates his concern regarding binding arbitration clauses in consumer contracts, particularly real estate contracts. Exhibit pp. 1-3. He states:

Binding arbitration clauses are a serious problem and economically stronger parties give weaker parties contracts of adhesion on a take-it-or-leave-it basis; only the Legislature can equitable and fairly intervene for the public good; this is a legitimate police-power function.

We cannot trust self-serving, special-interest lobbying groups such as the California Association of Realtors, Inc. to adequately protect consumers against "frequent-user bias" and other arbitration abuses (i.e., waiver of appeal, waiver of a jury trial, "secret" closed-door hearings, biased and corrupt arbitration panels, etc.).

Id. at 1. He includes a sample form that is intended to protect real estate consumers from oppressive arbitration clauses. *Id.* at 2-3.

Respectfully submitted,

Barbara Gaal
Chief Deputy Counsel

**EMAIL FROM SAM SHABOT TO BARBARA GAAL
(OCTOBER 19, 2009)**

Re: Binding Arbitration Clauses in Consumer Contracts of Adhesion

Dear Ms. Gaal:

Thank you kindly, Barbara, for pre-informing me of the upcoming CLRC meeting in Sacramento.

I will not be able to attend the Sacramento meeting; however, I would greatly appreciate your personally making sure that my interests in this matter is duly mentioned, noted, and represented.

Binding arbitration clauses are a serious problem and economically stronger parties give weaker parties contracts of adhesion on a take-it-or-leave-it basis; only the Legislature can equitable and fairly intervene for the public good; this is a legitimate police-power function.

We cannot trust self-serving, special-interest lobbying groups such as the California Association of Realtors, Inc. to adequately protect consumers against "frequent-user bias" and other arbitration abuses (i.e., waiver of appeal, waiver of a jury trial, "secret" closed-door hearings, biased and corrupt arbitration panels, etc.).

Attached hereto, please find a two-page Adobe PDF document which I would like you to distribute at the October meeting.

Please share both this e-mail and its attachment both with members of the public as well as the Commission members. Please also take some items from my faxes (of your own selection) that you feel worthy of presentation to the public and the full Commission.

The attachment is called "Final Buyer's Protective Addendum to Purchase Agreement Offer" and it overrides, deletes, replaces, and supersedes the grossly unconscionable "as-is" provisions found in California Association of Realtors, Inc. (CAR) "standard" forms, and provides a warning to the real estate consumer NOT to ever agree to binding arbitration.

Respectfully submitted,

SAM SHABOT

**** PLEASE OPEN AND SAVE THE ATTACHMENT ****

P.O. Box 4444

Palos Verdes Pnsl., CA 90274-9595

Telephone: (310) 485-9999

Buyer's Protective Addendum to Purchase Agreement/Offer

ADDENDUM

General Use

Notice to Seller's Listing Agent: Buyer entered into this transaction and determined a fair offering or purchase price based solely in reliance upon Seller's covenants, promises, inducements, assurances, statements, representations and warranties as duly set forth herein; therefore, exculpatory waivers and disclaimers will NOT be signed. For preliminary due diligence investigation, Buyer hereby demands Seller's full up-front disclosure of all known adverse material facts and information, including property-specific latent or hidden defects.

DATE: _____, 20_____, at _____, California.

Items left blank or unchecked are not applicable.

FACTS: **Do NOT Agree to Binding Arbitration**



Sam Shabot

1. This is an addendum to the following agreement:

- | | |
|--|---|
| <input checked="" type="checkbox"/> Purchase agreement | <input type="checkbox"/> Lease/rental agreement |
| <input type="checkbox"/> Counteroffer | <input checked="" type="checkbox"/> Escrow instructions |
| <input type="checkbox"/> Exchange agreement | <input checked="" type="checkbox"/> Incorporated by reference into the purchase agreement and escrow instructions |



1.1 dated _____, 20_____, at _____, California,

1.2 entered into by: _____ ("Buyer") and _____ ("Seller")

1.3 regarding real estate referred to as: _____

_____ ("Property")



AGREEMENT: **Re: Clarification of Intent as to Agreed-Upon Property Condition**



In addition to the terms of the above referenced agreement, the undersigned agree to the following:

1. Seller agrees that upon delivery of possession or close of escrow, whichever occurs FIRST: (a) all built-in items, appliances and fixtures, and all structural, electrical, mechanical, roofing, plumbing, heating, ventilation and air-conditioning (or cooling) systems shall be in "good working order" and free of leaks; (b) all broken or cracked glass, including mirrors and shower/tub enclosures and broken seals between double-pane windows, shall be replaced; and (c) damaged window and door screens shall be replaced. All of the foregoing shall be the affirmative contractual obligation of Seller, regardless of any "disclosures" made or conditions discovered by the parties or their agents, and notwithstanding any waiver or disclaimer signed by Buyer.
2. Seller shall convey "good and marketable" fee simple title to the Property, free and clear of all liens and encumbrances, and subject only to CC&R's, rights-of-way and easements of record, if any, which do NOT materially affect the value, desirability or intended use thereof. Title shall be transferred by warranty or grant deed and insured by an ALTA/ALTA-R paid by Seller.
3. By acceptance, Seller covenants, warrants and represents to Buyer that: (a) Seller has NOT received oral or written notices of violations relating to the Property from city, county, state, federal or any other governmental agencies; (b) Seller has NOT received oral or written notices of violations of CC&R's/deed restrictions or HOA rules and regulations; and (c) Seller is NOT aware of structural, design or construction defects except as otherwise disclosed in writing to Buyer PRIOR TO acceptance.

It is the express intent of both parties that the terms, conditions and provisions contained in THIS addendum shall fully replace and supersede any contrary or "as-is" language in any other forms, agreements or addenda, whether pre-printed or otherwise.

If Box is Checked ☐ Additional Buyer-Protective Terms, Conditions and Provisions are Contained in Separate Sheet(s) Attached Hereto and Made a Part Hereof.

I agree to the terms stated above.

Date: _____, 20_____

Name: _____

Signature: _____

Name: _____

Signature: _____



I agree to the terms stated above.

Date: _____, 20_____

Name: _____

Signature: _____

Name: _____

Signature: _____



Sam Shabot

Reasonable Consumer Expectations of Buyer

Sam Shabot



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CURRENT DEVELOPMENTS IN REAL ESTATE LITIGATION FOR THE INFORMATION OF OUR BROKER CLIENTS AND CUSTOMERS



Equal Housing Opportunity



DOES THE NEW C.A.R. CONTRACT REALLY FAVOR THE SELLER?



slanted in favor of the Seller:



It is not unusual for real estate forms to be slanted in favor of one of the parties. For example, there is a landlord's lease form and a tenant's lease form. The Northern California Forms Committee has long sought to make every effort to balance Professional Publishing forms so that they do not favor either of the parties, – buyer or seller, tenant or owner, broker or agent. At a recent Forms Committee meeting, a Pacific Union advocate for the use of the recently revised C.A.R. purchase agreement insisted that the contention that the C.A.R. contract was slanted in favor of the Seller was nonsense, and challenged anyone to show him a specific provision to support the accusation. Taking up the challenge, we sought the input of several real estate litigation attorneys and they promptly pointed out, among others, the following provisions which, although arguably desirable, most certainly are



UNDER THE C.A.R. PURCHASE OFFER BOTH THE CONDITION OF PROPERTY AND ITS TITLE ARE "AS IS."

AGENTS MUST PRESENT ALL OFFERS WITHOUT BIAS

1. **As Is.** The most important Seller advantage is the provision in paragraph 7-A that the "Property is sold in its present physical condition on the date of Acceptance. . . ." Although this means that the property is sold "as is," that phrase is not used because, according to C.A.R., "it may be confusing." To the contrary, the phrase has accepted legal meaning and is defined in Black's Legal Dictionary. Professional Publishing and

other contract forms require that all built in appliances and the electrical, plumbing (excluding irrigation systems), heating and cooling systems be in working order; that the roof be free of leaks; and that all broken or cracked glass, including mirrors and shower enclosures, and broken window seals be replaced;

and damaged window and door screens be repaired. Since many buyers making an offer do not intend that it be "as is," agents are under an affirmative fiduciary duty to clearly explain this provision to their clients and advise them that the offer does not need to contain an "as is" provision.

JAMES B. MCKENNEY
GENERAL COUNSEL



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